Agrovenus LLP v Pacific Inter-Link Sdn Bhd and another appeal

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NOS W-02(NCC)-176–01 OF 2012 AND W-02(NCC)-177–01 OF 2012
ABDUL WAHAB PATAIL, AZIAH ALI AND ANANATHAM KASINATHER JJCA
7 JANUARY 2014

Arbitration — Award — Enforcement — Whether party liable to pay under award estopped from objecting to recognition/enforcement of award — Whether party liable should have objected to jurisdiction of arbitral tribunal before tribunal and not during proceedings before High Court to recognise/enforce award — Arbitration Act 2005 ss 38 & 39

The parties in the two appeals agreed that the decision in the appeal between Food Ingredients LLC ('the appellant') and Pacific Inter-Link Sdn Bhd ('the respondent') would bind the other appeal. The appellant and the respondent had entered into a contract ('the sale contract') for the sale of palm olein and palm kernel oil at agreed prices per tonne inclusive of freight charges. The sale contract contained an arbitration agreement under which it was agreed that English law would govern any disputes referred by the parties under the sale contract to arbitration. A dispute over whether the respondent had orally agreed ('the oral agreement'), a week after the sale contract was entered into, to give the appellant a discount per tonne on the freight charges. The appellant referred the dispute to arbitration. The arbitral tribunal found in favour of the appellant and ordered the respondent to pay the appellant a certain sum constituting the agreed discount. The sum was not paid forcing the appellant to seek recognition or enforcement of the arbitral award by applying to the High Court in Malaysia for same under s 38 of the Arbitration Act 2005 ('the AA'). The respondent objected to the application under s 39(1)(a)(ii), (iv) and (v) of the AA, specifically on the point that the arbitral tribunal did not have jurisdiction to make the award and that the award dealt with a dispute not contemplated by or falling within the terms of the arbitration agreement. In essence, the respondent argued that there was no oral agreement and that even if there was one, it was a fresh agreement unsupported by consideration and, furthermore, there was no arbitration agreement in respect of that fresh agreement. Accordingly, the respondent argued, the arbitral tribunal, which was concerned only with disputes under the sale contract, did not have jurisdiction over the fresh agreement. The High Court agreed with the respondent's argument and dismissed the appellant's application resulting in the instant appeal.

Held, allowing the appeal, setting aside the orders of the High Court and allowing the appellant's application for recognition/enforcement of the arbitral award:

(1) The oral agreement had to be read together with the sale contract. The arbitration agreement in the sale contract, therefore, applied and the arbitral tribunal had jurisdiction to determine the dispute under the oral agreement for reduction of the freight component under the sale contract (see para 26).

(2) The dispute whether there was a reduction of the freight rate component in the prices agreed under the sale contract was necessarily a dispute or disagreement arising out of the sale contract or in relation to it and it could properly be taken to the arbitral tribunal under the sale contract. Even if the oral agreement was a new agreement, it did not exist in isolation. If an agreement concerned the reduction of a payment under another agreement, then such agreement should be read together with that other agreement because, among other things, no reduction would arise unless there was payment due under that other agreement (see para 25).

(3) The respondent raised the objection concerning the jurisdiction of the arbitral tribunal for the first time at the High Court when the appellant sought recognition or enforcement of the arbitral award. No explanation was given for its failure to raise the objection to jurisdiction before the arbitral tribunal. The objection was made only after the respondent had fully participated in the arbitration suggesting that the respondent was keeping the objection as to jurisdiction up its sleeve to be used to challenge any award which went against it. English law, which applied to the arbitration proceedings in the instant case, would prohibit the respondent from raising the objection as to jurisdiction before the High Court because it had failed to do so before the arbitral tribunal (see paras 30(b) & (c)).

(4) The respondent was estopped from raising objections as to the jurisdiction of the arbitral tribunal after causing all parties to act on the basis it had accepted that the tribunal had jurisdiction. Its conduct did not commend itself to an exercise of discretion in its favour to refuse recognition or enforcement of the arbitral award. It had failed to prove why recognition or enforcement of the award under s 38 ought to be refused under s 39(1)(a) of the AA (see paras 30(d) & 31).

[Bahasa Malaysia summary

Pihak-pihak dalam dua rayuan ini bersetuju bahawa keputusan dalam rayuan antara Food Ingredients LLC ('perayu') dan Pacific Inter-Link Sdn Bhd ('responden') akan mengikat rayuan lain. Perayu dan responden telah memasuki kontrak ('kontrak jualan') bagi penjualan olein sawit dan minyak

isirung kelapa sawit se tan pada harga dipersetujui termasuk bayaran tambang muatan. Kontrak jualan mengandungi perjanjian timbang tara di bawahnya yang mana mereka telah bersetuju bahawa undang-undang Inggeris akan menentukan apa-apa pertikaian yang dirujuk oleh pihak-pihak di bawah kontrak jualan kepada timbang tara. Suatu pertikaian sama ada responden telah secara lisan bersetuju ('perjanjian lisan'), seminggu selepas kontrak jualan dimasuki, untuk memberi perayu diskaun untuk setiap setan tambang muatan. Perayu merujuk pertikaian itu kepada timbang tara. Tribunal timbang tara memihak kepada perayu dan memerintahkan responden membayar sejumlah wang kepada perayu termasuk diskaun dipersetujui. Jumlah wang tersebut tidak dibayar memaksa perayu untuk mendapatkan pengiktirafan atau penguatkuasaan award timbang tara dengan memohon ke Mahkamah Tinggi Malaysia untuk hal yang sama di bawah s 38 Akta Timbang Tara 2005 (AT). Responden membantah kepada permohonan tersebut di bawah s 39(1)(a)(ii), (iv) dan (v) AT, khususnya kepada perkara bahawa tribunal timbang tara tidak mempunyai bidang kuasa untuk membuat award dan bahawa award yang dibicarakan bersama pertikaian tidak dinyatakan oleh atau jatuh dalam apa-apa terma perjanjian timbang tara. Pada dasarnya, responden berhujah bahawa tiada perjanjian lisan dan bahawa jikapun ada, ia merupakan perjanjian baru yang tidak disokong oleh pertimbangan dan, tambahan lagi, tiada perjanjian timbang tara berkenaan dengan perjanjian baru itu. Oleh itu, responden berhujah, tribunal timbang tara, yang hanya berkaitan dengan hal pertikaian di bawah kontrak jualan, tidak mempunyai bidang kuasa atas perjanjian baru. Mahkamah Tinggi bersetuju dengan hujahan responden dan menolak permohonan perayu menyebabkan rayuan ini.

Diputuskan, membenarkan rayuan, mengetepikan perintah Mahkamah Tinggi dan membenarkan rayuan perayu untuk pengiktirafan/penguatkuasaan award timbang tara:

(1) Perjanjian lisan hendaklah dibaca bersama-sama dengan kontrak jualan. Perjanjian timbang tara dalam kontrak jualan, oleh itu, diguna pakai dan tribunal timbang tara mempunyai bidang kuasa untuk menentukan pertikaian di bawah perjanjian lisan untuk mengurangkan tambang muatan di bawah kontrak jualan (lihat perenggan 26).

(2) Pertikaian sama ada terdapat pengurangan untuk kadar tambang muatan dalam harga yang dipersetujui di bawah kontrak jualan adalah satu pertikaian atau perselisihan yang timbul dari kontrak jualan atau perkara berkaitan dengannya dan ia boleh dengan secara betul dibawa ke tribunal timbang tara di bawah kontrak jualan. Jikapun perjanjian lisan merupakan perjanjian baru, ia tidak wujud secara berasingan. Sekiranya perjanjian berkaitan dengan pengurangan bayaran di bawah satu lagi perjanjian lain, maka perjanjian itu perlu dibaca bersama-sama dengan

perjanjian tersebut kerana, antara lain, tiada pengurangan akan timbul kecuali ada bayaran tertunggak di bawah satu lagi perjanjian yang lain (lihat perenggan 25).

(3) Responden telah menimbulkan bantahan berkaitan dengan bidang kuasa tribunal timbang tara untuk pertama kali sewaktu di Mahkamah Tinggi apabila perayu meminta pengiktirafan atau penguatkuasaan award timbang tara. Tiada penjelasan diberikan untuk kegagalannya untuk menimbulkan bantahan kepada bidang kuasa sebelum tribunal timbang tara. Bantahan hanya dibuat setelah responden ikut serta dalam timbang tara yang mencadangkan responden memastikan bantahan kepada bidang kuasa secara diam-diam untuk digunakan untuk mencabar sebarang award yang tidak berpihak kepadanya. Undang-undang Inggeris, yang diguna pakai kepada prosiding timbang tara dalam kes ini, akan menghalang responden daripada menimbulkan bantahan terhadap bidang kuasa di hadapan Mahkamah Tinggi kerana responden telah gagal untuk berbuat demikian di hadapan tribunal timbang tara (lihat perenggan 36(b) & (c)).

(4) Responden diestop daripada menimbulkan bantahan terhadap bidang kuasa tribunal timbang tara setelah menyebabkan semua pihak untuk bertindak atas dasar yang telah diterima bahawa tribunal mempunyai bidang kuasa. Tindakannya tidak memuji dirinya untuk menggunakan budi bicara untuk menolak pengiktirafan atau penguatkuasaan award tribunal timbang tara. Responden gagal untuk membuktikan mengapa pengiktirafan dan penguatkuasaan award di bawah s 38 hendaklah ditolak di bawah s 39(1)(a) AT (lihat perenggan 30(d) & 31).]

Notes

For cases on enforcement, see 1(1) *Mallal's Digest* (4th Ed, 2014 Reissue) paras 1750–1766.

Cases referred to

Aloe Vera of America, Inc v Asianic Food (S) Pte Ltd [2006] 3 SLR 174, HC (refd)

Ashville Investments Ltd v Elmer Contractors Ltd [1989] 1 QB 488, CA (refd)

Boustead Trading (1985) Sdn Bhd v Arab-Malaysia Merchant Bank Bhd [1995] 3 MLJ 331, FC (refd)

Capital Trust Investments Ltd v Radio Design TJ AB [2002] 2 All ER 159, CA (refd)

Dallah Real Estate and Tourism Holding Co v The Ministry of Religious Affairs, Government of Pakistan [2009] EWCA 755, SC (not folld)

Dardana Ltd v Yukos Oil Co [2002] 2 Lloyd's Rep 326, CA (refd)

Denmark Skibstekniske Konsulenter A/S Likvidation v Ultrapolis 3000 Investments Ltd [2010] 3 SLR 661, HC (refd)

Faghirzadeh v Rudolf Woolf SA (Pty) Ltd [1977] 1 Lloyd's Rep 630, QBD (refd)

Fiona Trust & Holding Corpporation and others v Yuri Privalov and others [2007] 4 All ER 951, HL (refd)
Galsworthy Ltd of the Republic of Liberia v Glory Wealth Shipping Pte Ltd [2010] SGHC 304, HC (refd)
National Land Finance Co-Operative Society Ltd v Director General of Inland Revenue [1994] 1 MLJ 99; [1993] 4 CLJ 339, SC (refd)
Rustall Trading Ltd v Gill & Duffus SA [2000] 1 Lloyd's Rep 14, QBD (folld)
Strandore Invest A/S and Others v Soh Kim Wat [2010] SGHC 151, HC (refd)

Legislation referred to

Arbitration Act 2005 ss 38, 39, 39(1)(a)(ii), (iv), (v)
English Arbitration Act [UK] ss 31, 73
International Arbitration Act [SG] s 30(1)(b)
Rules of Court 2012 O 69 r 6(1)(a)

Appeal from: Originating Summons Nos 24 NCC(ARB)-37–10 of 2011, W-02(NCC)177–01 of 2012, 24 NCC(ARB)-25 of 2011 (High Court, Kuala Lumpur)

WM Chang (Hor Shirley with him) (Raja, Darryl & Loh) for the appellants.
Arun Krishnalingam (Sativale Mathew Arun) for the respondent.

Abdul Wahab Patail JCA (delivering judgment of the court):

[1] At the commencement of the hearing of the appeal, the court was informed by the parties that they agree that the decision in Civil Appeal W-02(NCC)-177–01 of 2012 will apply to and binds the parties in Civil Appeal W-02(NCC)-176–01 of 2012.

BRIEF BACKGROUND

[2] The parties had entered into a sale contract dated 3 April 2009 for the sale of Palm Olein and Palm Kernel Oil. The price of Palm Olein at USD849.75 per tonne and Palm Kernel Oil at USD820.50 per tonne included freight charges. The sale contract contained an arbitration agreement. The dispute submitted to the arbitration by the appellant and the respondent was whether, at a meeting on 10 April 2009 in Istanbul, the respondent Pacific Inter-Link Sdn Bhd as seller, had agreed orally to give the appellant a discount of USD30 per tonne in respect of adjustment of the freight component.

[3] The arbitration was conducted on documents only. The arbitral tribunal concluded that the respondent had orally agreed to give the discount of USD30 per tonne. On this basis, it awarded the sum of USD180,768.42 to the appellant.

[4] By an originating summons on 15 August 2011, the appellant Food Ingredients LLC had applied, pursuant to s 38 of the Arbitration Act 2005 ('the Act'), to the High Court to recognise and enforce an award it had obtained against the respondent ('the award').

[5] The application was dismissed on 16 December 2011 with costs by the High Court on objections raised by the respondent under s 39(1)(a)(ii), (iv) and (v) of the Act. The High Court held that the arbitral tribunal had no jurisdiction to make the award as the arbitration agreement did not extend to the disputes raised in the arbitration.

[6] The appellant appealed to this court.

[7] After hearing the parties, we allowed the appeals with costs, set aside the orders of the High Court and entered judgment in terms of the originating summons of 15 August 2011. We maintained costs RM10,000 in the court below and awarded costs in the sum of RM7,500 in this court for each appeal.

[8] The following are our reasons.

THE ARBITRATION ACT 2005 ACT 646

[9] The appellant's application was made under s 38 of Act for the award to be recognised as binding and be enforced by entry as a judgment in terms of the award or by action.

[10] The respondent requested a refusal under s 39 which provides:

> (1) Recognition or enforcement of an award, irrespective of the State in which it was made, may be refused only at the request of the party against whom it is invoked:
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> (a) where that party provides to the High Court proof that:
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> (i) a party to the arbitration agreement was under any incapacity;
>
> (ii) the arbitration agreement is not valid under the law to which the parties have subjected it, or, failing any indication thereon, under the laws of the State where the award was made;
>
> *[(1)(a)(11) Am. Act A1395: s 8 — Prior text read — 'the arbitration agreement is not valid under the law to which the parties have subjected it, or, failing any indication thereon, under the laws of Malaysia;'*
>
> (iii) the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present that party's case;
>
> (iv) the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration;

(v) subject to subsection (3), the award contains decisions on matters beyond the scope of the submission to arbitration;

[(1)(a)(v) Am. Act A1395: s 8 — Prior text read — 'subject to subsection (2), the award contains decisions on matters beyond the scope of the submission to arbitration;'

(vi) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless such agreement was in conflict with a provision of this Act from which the parties cannot derogate, or, failing such agreement, was not in accordance with this Act; or

(vii) the award has not yet become binding on the parties or has been set aside or suspended by a court of the country in which, or under the law of which, that award was made; or

(b) if the High Court finds that:

(i) the subject-matter of the dispute is not capable of settlement by arbitration under the laws of Malaysia; or

(ii) the award is in conflict with the public policy of Malaysia.

(2) If an application for setting aside or suspension of an award has been made to the High Court on the grounds referred to in subpara (1)(a) (vii), the High Court may, if it considers it proper, adjourn its decision and may also, on the application of the party claiming recognition or enforcement of the award, order the other party to provide appropriate security.

(3) Where the decision on matters submitted to arbitration can be separated from those not so submitted, only that part of the award which contains decisions on matters submitted to arbitration may be recognized and enforced.

[(3) Ins. Act A1395: s 8]

[11] It was submitted for the respondent that upon similar provision in Singapore, it was held in *Galsworthy Ltd of the Republic of Liberia v Glory Wealth Shipping Pte Ltd* [2010] SGHC 304, that there are two stages regarding the enforcement proceedings, with the first stage of enforcement pertaining to the initial grant of leave to enforce, and the second stage of enforcement pertaining to the stage where a party against whom an award was made resists the enforcement, and that in *Denmark Skibstekniske Konsulenter A/S Likvidation v Ultrapolis 3000 Investments Ltd* [2010] 3 SLR 661, the learned judge, at the first stage of the enforcement, determined if the arbitration clause in the standard conditions formed part of the new agreement before it can be satisfied that the arbitration had been produced as required by s 30(1)(b) of the International Arbitration Act of Singapore and O 69 r 6(1)(a) of the Rules of Court. It was also held that in doing so, the court would take, as in *Aloe Vera of America, Inc v Asianic Food (S) Pte Ltd* [2006] 3 SLR 174, and *Dardana Ltd v Yukos Oil Co* [2002] 2 Lloyd's Rep 326, a 'mechanistic' or formalistic approach

as to compliance with s 38 of the Act, primarily to produce the original award or a duly certified copy thereof and the original arbitration agreement or a duly certified copy thereof. The submission for the respondent went on to discuss at some length the decision and principles in *Dallah Real Estate and Tourism Holding Co v The Ministry of Religious Affairs, Government of Pakistan* [2009] EWCA 755, a decision of the Supreme Court of the United Kingdom, followed in *Strandore Invest A/S and Others v Soh Kim Wat* [2010] SGHC 151 and *Galsworthy Ltd of the Republic of Liberia v Glory Wealth Shipping Pte Ltd*.

[12] The High Court considered *Dallah Real Estate and Tourism Holding Co v The Ministry of Religious Affairs, Government of Pakistan* at some length. The fact matrix of the case differs substantially from the present, and we do not think therefore that the present case necessarily warrants a consideration of which principles may be adopted and which may not.

[13] In our view, s 38 reflects the obvious. An applicant for recognition or enforcement of an award must first satisfy the court that there is an award and an arbitration agreement that authorised it. That would show of the tribunal that made the award sought to be recognised and enforced is the tribunal referred to in the arbitration agreement. Although an objection as to jurisdiction of the arbitral tribunal could be argued on the basis of the terms of the arbitration agreement, we accept that a formalistic approach to compliance with s 38, by production of the copy of the award and the sale contract of 3 April 2009 relating to the transaction in dispute and containing an arbitration agreement suffices under s 38 as prima facie proof.

[14] We held the view that the second stage is s 39, which deals with the request and grounds relied upon for refusal of the recognition or enforcement sought, and that this second stage is where questions relating to jurisdiction of the arbitral tribunal as well as whether, inter alia, the arbitral tribunal exceeded its jurisdiction or dealt with any dispute not contemplated or not falling within the terms of the submission to arbitration may properly be addressed.

[15] We make the observation that the division under ss 38 and 39 into two stages is to simplify the application for recognition or enforcement of an award and the process of dealing with exercise of discretion to refuse that application. This is consistent with recognition of such arbitrations as a specialised tribunal for resolution of commercial disputes or disagreements by those in commerce.

[16] The respondent, in this case, is clearly the party against whom the recognition or enforcement of the award is invoked and who is requesting refusal. Section 39(1)(a) requires that it must satisfy the High Court with proof of any of the grounds set out in paras (i)–(vii) thereof that it relied upon. In this case, para (ii) was relied upon.

DISPUTE SUBMITTED TO ARBITRATION

[17] As mentioned earlier above, the dispute submitted to the arbitration by the parties was whether at a meeting on 10 April 2009 in Istanbul, the respondent Pacific Inter-Link Sdn Bhd as seller had agreed orally to give the appellant a discount of USD30 per tonne in respect of adjustment of the freight component in the price agreed in the sale contract of 3 April 2009. The arbitral tribunal found on the evidence put before it by the parties, that the respondent had, and awarded the sum of USD180,768.42.

[18] The sum was not paid, forcing the appellant to seek recognition or enforcement of the award under s 38 of the Act.

REFUSAL TO RECOGNISE AND ENFORCE AWARD

[19] However, when the appellant applied under s 38 of the Act to the High Court, the respondent as the party against whom s 38 is invoked s 39(1)(a)(ii) and requested that the application be refused. To succeed, s 39(1)(a) requires the respondent to provide proof to the High Court of that ground relied upon.

[20] Under s 39(1)(a)(ii), the respondent's approach was to question the jurisdiction of the arbitral tribunal. The respondent did so in this way:

(a) the sale contract of 3 April 2009 was effectively spent by 10 April 2009 as payment was made, the product shipped;

(b) there was no agreement to reduce the freight component; and

(c) even if there were an oral agreement, there was no consideration.

[21] To put it another way, a price reduction agreement of the freight component, if any, is a new agreement and:

(a) there is no such agreement as there is no evidence and there is no consideration for the agreement; and therefore any matter as to existence of any such is not within the jurisdiction of the arbitral tribunal under the sale contract of 3 April 2009; and alternatively

(b) if it is accepted there is such an oral agreement, there is no arbitration agreement therein to appoint the arbitral tribunal under the sale contract of 3 April 2009 as the arbitral tribunal thereunder.

[22] The appellant's answer to the issue of lack of jurisdiction being raised is that the issue had never been addressed at any time by the respondent before the arbitral tribunal, and therefore ought not to be considered. The respondent's response is that since the award was made on 12 January 2011 and

A the present s 39(1)(a)(ii) came into effect on 1 July 2011, the question of validity of the arbitration agreement must be decided under the previous provision that it be decided under the laws of Malaysia.

OUR FINDINGS

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[23] We turn to the question of the request for the exercise of the discretion to refuse recognition or enforcement of the award. The respondent relied on the ground that the arbitral tribunal had no jurisdiction. The appellant relied upon the ground that the discretion to refuse ought not to be exercised.

C

THE ARBITRAL TRIBUNAL HAD NO JURISDICTION

[24] We agree that the question whether the arbitral tribunal was conferred with jurisdiction or had jurisdiction, is a matter for an independent consideration by the High Court requested to exercise its discretion to refuse recognition or enforcement of an award, and its own decision as to whether it had jurisdiction is immaterial.

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[25] In considering whether the arbitral tribunal had jurisdiction, we considered whether there is or is not a new agreement. We concluded that even if the oral agreement is a new agreement, it is not one that emerged and existed in isolation for the following reasons:

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(a) if an agreement is as to reduction of a payment under another agreement, then such agreement is to be read together with that other agreement not only for the reason that no reduction arises unless there is payment due under the other agreement, but in the event of need for interpretation of words and terms used, to ensure that a meaning that is consistent and complementary can be applied;

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(b) cl 6.1 of the sale contract of 3 April 2009 provided that any dispute or disagreements which may arise out of the agreement or in relation to it, shall be settled by mutual consultations failing which the dispute shall be settled by arbitration in accordance with the regulations and procedures of FOSFA in London and as per the English Law. Rules of English law are applicable to the contract.

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(c) The dispute whether there is a reduction of freight rate component in a sale price agreed the sale contract is necessarily a dispute or disagreement which arose out of the sale contract or in relation to it and may properly be taken to the arbitral tribunal under the sale contract. See *Faghirzadeh v Rudolf Woolf SA (Pty) Ltd* [1977] 1 Lloyd's Rep 630; *Ashville Investments Ltd v Elmer Contractors Ltd* [1989] 1 QB 488; *Capital Trust Investments*

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Ltd v Radio Design TJ AB [2002] 2 All ER 159; *Fiona Trust & Holding Corpporation and others v Yuri Privalov and others* [2007] 4 All ER 951 (HL).

[26] Hence, the oral agreement of 10 April 2009 is to be read with the sale contract of 3 April 2009. Accordingly, the arbitration agreement in the sale contract of 3 April 2009 applied and the arbitral tribunal had jurisdiction to determine the dispute or disagreement on the oral agreement for reduction of the freight component of the price under the sale contract of 3 April 2009.

THE DISCRETION TO REFUSE OUGHT NOT TO BE EXERCISED

[27] We held that an amendment is not given retrospective effect unless it is shown that a retrospective effect is intended by Parliament. See *National Land Finance Co-Operative Society Ltd v Director General of Inland Revenue* [1994] 1 MLJ 99; [1993] 4 CLJ 339. That not having been demonstrated, a retrospective effect cannot be applied to the amended s 39(1)(a)(ii). That being so, the effect of ss 31 and 73 of the English Arbitration Act providing that the right to objection on grounds of jurisdiction may be lost if not taken up before the arbitral tribunal within the time frames allowed is not imported by the s 39(1)(a)(ii) for consideration by the High Court.

[28] But this alone does not dispose of the matter, because even though not imported by s 39(1)(a)(ii) as it presently stands, the parties to the sale contract of 3 April 2009 had made provision by cl 6.1 to subject the sale contract and its arbitration agreement to English law. Clause 6.1 of the sale contract of 3 April 2009 provided that:

> Any dispute or disagreements, which may arise out of this agreement or in relation to it, shall be settled by mutual consultations. If an agreement is not reached, the dispute shall be settled by arbitration in accordance with the regulations and procedures of FOSFA in London and as per the English Law, Rules of English law are applicable to the present contract.

[29] If English law is applied, then the objection as to jurisdiction cannot be raised before the High Court because the respondent had not done so before the arbitral tribunal nor explained why it was not raised earlier.

[30] Even if we are wrong as to the above, and the previous s 39(1)(a)(ii) that is applicable requires a consideration of the jurisdiction of the arbitral tribunal under the laws of Malaysia, we held that such a consideration of the exercise of the judicial discretion under s 39(1)(a) whether to refuse recognition or enforcement of an award on the grounds of lack of jurisdiction of the arbitral

tribunal calls for consideration of the following:

(a) the jurisdiction or scope of an arbitral tribunal is conferred by the agreement of the parties to give and to accept its jurisdiction. The first source of the agreement is the terms of the arbitration clause. That agreement may be express, or implied. The fact there is or is not an agreement, does not prohibit the parties from reaching subsequent agreement conferring jurisdiction or additional jurisdiction or scope to the arbitral tribunal. That agreement may be implied where both parties did not object to but instead submitted upon the additional matter or scope to the arbitral tribunal;

(b) the respondent, in this case, raised the objection as to the jurisdiction of the arbitral tribunal for the first time at the High Court in Malaysia when the appellant sought recognition or enforcement of the award by the arbitral tribunal. Given that arbitral tribunal proceedings are not informal proceedings, but are undertaken by parties with the clear intention of obtaining a decision that settles the dispute between the parties, parties cannot be unaware if the arbitral tribunal lacks jurisdiction because jurisdiction is conferred by the parties;

(c) yet no explanation was given for the failure to object to jurisdiction before the arbitral tribunal, particularly since English law would require the respondent to have made the objections as to jurisdiction before the arbitral tribunal or lose the right to make the objection. The objection made only after having participated fully in the arbitration at all times, and even then only when the appellant sought recognition or enforcement of the award by the High Court suggests the respondent took part in the proceedings before the arbitral tribunal while keeping it up its sleeve the objection as to jurisdiction to be used to challenge the award if the award went against it. We agree with the description in *Rustall Trading Ltd v Gill & Duffus SA* [2000] 1 Lloyd's Rep 14 that this is a fundamental principle of objection. A party cannot seek to have its cake and at the same time eat it too; and

(d) furthermore, the fact of failure to object at the proceedings before the arbitral tribunal and thus causing all parties to act on the basis the respondent accepted that the arbitral tribunal had jurisdiction or scope certainly does not commend itself to an exercise of discretion in favour of the respondent to refuse recognition or enforcement of the award. It calls properly for the application of the doctrine of estoppel as enunciated in *Boustead Trading (1985) Sdn Bhd v Arab-Malaysia Merchant Bank Bhd* [1995] 3 MLJ 331 (FC).

[31] We held that the above results in the respondent failing to provide to the High Court proof of why recognition or enforcement of the award under s 38 ought to be refused under s 39(1)(a) of the Act.

[32] Accordingly, the High Court ought not to have refused to recognise or enforce the award, and made the orders above stated.

Appeal allowed, orders of the High Court set aside and appellant's application for recognition/enforcement of arbitral award allowed.

Reported by Ashok Kumar